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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6884

KEITH FAIR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN SUPORT OF WRIT OF CERTIORARI

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Petitioner respectfully submits this supplemental brief seeking a writ of certiorari to review the judgment of the Supreme Court of Georgia affirming his conviction and sentence to death. Since the filing of the original Petition in this Court the opinion below has been reported as Fair v. State, 245 Ga. 868, SE 2d (1980).

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I. PETITIONERS CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THIS COURT.

Respondent has conveniently avoided the crux of Petitioner's argument in cleverly attempting to argue that the issues now before this Court have not been raised properly below.

However, the violation of Petitioner's constitutional rights was a direct result of the Georgia Supreme Court opinion itself.

It is well settled law that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. See, e.g., Staub v. Baxley, 355 U.S. 313, 320 (1958); N.A.A.C.P. ex rel. Patterson v. Alabama, 357 U.S. 449,454-458 (1958); N.A.A.C.P. v. Alabama, ex rel. Flowers, 377 U.S. 288, 293-301 (1964); Wright v. Georgia, 373 U.S. 284, 289-291 (1963)

In Paul v. Davis, 424 U.S. 693 (1976) this Court said:

> "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant by the Due Process Clause. These interests attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status...In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the state, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

It is clear that in the instant case, what Petitioner complains of is the unforseeable judicial curtailment of his statutory rights by the Georgia Supreme Court in its affirmance of Petitioner's conviction and sentence to death.[1]

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[1] It must be noted that Petitioner clearly raised these issues in his Motion for Rehearing before the Georgia Supreme Court. (R-) (record unavailable)

Respondent recognizes that this is a case of first impressions for the Georgia Supreme Court. Brief of Respondent, pp. 14,16. Respondent also recognizes this Courts rulings in Bouie v. Columbia, 378 U.S. 347 (1964) and Bunkerhoff Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). Clearly, under those cases, where the construction of a state statue by the highest court of that state violates a constitutional mandate; and, as here, results in a sentence of death, it cannot be seriously argued that this Court cannot review such a procedure.[2]

Time after time, since early in the nineteenth century, the Georgia Court of Appeals has tenaciously guarded the criminal defendants right to withdraw his guilty plea. See, Ware v. State, 128 Ga. App. 407. In Ware, the trial court scrupulously examined the defendant; advised her of all her rights accruing under the federal and state constitutions; indicated that the sentence might be the maximum allowable under law; and determined the voluntariness of her plea. The court reversed the conviction citing as error the trial courts failure in not permitting the defendant to withdraw her plea of guilty. In so ruling, the court stated:

> "Even though there is currently a hue and cry against courts enforcing our time honored individual rights earned through the blood of American patriots, we cannot and we shall not yield to such clamor. The courts must remain the bastion protecting the individual and his rights."
>
> 128 Ga. App. at 412

Further, contrary to the assertion of both the Respondent (Brief, p.13) and the Georgia Supreme Court (Slip. Opinion, P.16), the purpose of this statute (27-1404) is not to facilitate plea bargaining; but, as has been recognized throughout the history of the statute, its purpose is to "guarantee to all persons charged with crime a trial by a jury". Woodward v. State, 13 Ga. App. 130,131. Thus, the opinion below has both eliminated the Defendants

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[2] It must be noted that the Georgia Supreme Court failed to directly meet the issue of "pronouncement" under Ga. Code Ann. 27-1404, and religated its comments to mere dictum in a footnote. Fair, slip opinion at P. 18, fn. 5.

statutory right, and denied him a trial by jury as guaranteed by the Sixth Amendment.

In sum, clearly the constitutional question arises from the Georgia Supreme Courts opinion itself. Even where state courts have not previously interpreted a state statute (nor passed on its constitutionality), it is the duty of the federal courts to decide the federal question arising therefrom. See, Zwickler v. Koota, 389 U.S. 241. Respondent has failed to recognize that a statute may be both unconstitutional on its face; or, may be unconstitutionally applied under the facts of a particular case. It is the latter which Petitioner asserts in the instant Petition, which may, of course, be reviewed by this Court.

This Court has recognized the qualitative difference between capital cases and criminal cases in general, thus requiring particular scrutiny to assure fairness at all stages of a capital proceeding. It is the nature of the sanction, not the type of proceeding, which controls the application of procedural protections. Thus, in any capital case, the procedures employed must bear a reasonable relation to the quality of the santion to be imposed.

The death penalty is a unique sanction and, as such must be treated as a unique feature of our jurisprudence. Georgia law has created a procedural structure which offers its protection to all criminal defendants. The opinion below seeks to distinguish between a capital defendant and other criminal defendants which does not satisfy the strict equation required by this Court before a state may assert its constitutional right to claim human life. The temporal principles of " due process " sound hollow, even cruel, in the context of the death penalty. Constitutional rights may be recognized and restored to the living, but these rights cannot be restored to the dead. Fair seeks to assert his statutory any constitutional rights, but has been denied by the application of statutory interpretation given by the opinion of the Georgia Supreme Court below.

II. THE GEORGIA SUPREME COURT IMPROPERLY AFFIRMED THE IMPOSITION OF THE DEATH PENALTY UNDER GA. CODE ANN. 27-2534.1(b)(7) AND GODFREY v. GEORGIA 48 U.S.L.W. 4541 (1980).

The review of all death cases mandated by the Georgia death penalty scheme (Ga. Code Ann. 27-2537) and this Courts rulings that this review is a

constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants", Gregg v. Georgia, 428 U.S. 153,204 (1976) (plurality opinion) require that the Georgia Supreme Court meet all constitutional infirmities appearing in the sentencing phase of a death case. As the prevailing opinion in Godfrey v. Georgia, 48 U.S.L.W. 4541 emphasized, the Supreme Court of Georgia has not "applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman'..." 48 U.S.L.W. 4545. Unless such a construction is employed in the sentencing review, such a death sentence cannot stand.

The review conducted by the Georgia Supreme Court has no evidentiary support in the record. A finding without evidentiary support in the record is by definition arbitrary. See, Schware v. Board of Bar Examiners, 353 U.S. 232,239 (1957) and cannot supply any "principled way to distinguish [a]... case, in which the death penality was imposed, from the many cases in which it was not." 48 U.S.L.W. at 4545. Where federal rights are at stake, factual findings upon which their denial turns are subject to plenary and independent federal review on appeal, See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Haynes v. Washington, 373 U.S. 503, 515-516 (1963), and cases cited. Here, the facts cannot fairly be found to fall within a properly limited construction of (b)(7) and the death sentence imposed therein is therefore arbitrary and capricous.

Further, the addendum to Petitioner's opinion fails to satisfy Godfrey in that:

(a) The fact that one or more aggravating circumstances other than the one defined by (b)(7) was found does not immunize a death sentence from invalidation under Godfrey. If a (b)(7) finding was among those found by the trial court, the ensuing death sentence must be set aside, however many other aggravating circumstances were also found.

Pursuant to the Georgia statutory procedure, a sentencing jury (or judge) makes its life-or-death decision after a deliberative process in which "attention is directed to the specific circumstances of the crime [and]...the characteristics of the person who committed the crime". Gregg, supra, 428 U.S. at 197. The function of the statutory definitions of aggravating circumstances is to direct the sentencer's attention to the relevant factors. Id. at 197-198, 206-207. In the case of judge sentencing, the trial

judge must consider all of those factors which are warranted by the evidence. A life sentence may be recommended even if two or three or four or five aggravating circumstances are found. One or more aggravating circumstances findings is enough to permit a death sentence; but no particular number ever requires a death sentence. Under this scheme, each and every aggravating circumstance which the judge finds may therefore tip the delicate balance; and, if a death sentence is returned, the part played in it by any single aggravating circumstance which the jury found "can only be the subject of sheer speculation." 48 U.S.L.W. at 4544. Thus, if a (b)(7) finding was impermissibly permitted it may or may not have spelled the difference between life and death. No one knows, or can know, that it did not. This invokes the ordinary rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound footing requires its reversal. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); and cf. Chapman v. California, 386 U.S. 18, 23-24 (1967). Therefore, if a criminal case is submitted to a judge under instructions which permit him to convict upon alternate legal theories one of which is constitutionally acceptable and another of which is constitutionally unacceptable its general verdict of conviction cannot stand. E.g., Stromberg v. California, 283 U.S. 359, 367-368 (1931); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970). This rule is the same where the trier of fact is a judge rather than a jury . E.g., Thomas v. Collins, 323 U.S. 516, 528-529 (1945); Street v. New York , 394 U.S. 576, 585-588 (1969)

That these fundamently principles apply with no less force at the penalty stage of a death case cannot be argued; indeed they apply with added force. E.g., Presnell v. Georgia, 439 U.S. 14, 16 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Woodson, supra, makes it intolerable that a death sentence should be carried out where there is any ambiguity in the record as to whether constitutional requirements for capital sentencing have been observed. See also, Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21 (1968); Andres v. United States, 333 U.S. 740, 752 (1948).

(b) The addendum fails to support the necessary elements of the Georgia Supreme Court's tests in Harris v. State, 237 Ga. 718, 230 SE 2d 1 (1976) and Blake v. State, 239 Ga. 292, 236 SE 2d 637 (1977) as construed by

Godfrey, supra. Specifically, that "depravity of mind" comprehends only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing the victim; and that the word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. No facts authorizing such a reading are present in the record, nor in the addendum of the Georgia Supreme Court opinion.

(c) The Courts reliance on Hance v. State, 245 Ga. 856, 862 in the addendum is also inapposite. The court there stated in pertinent part:

> "A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code 26-1305,supra)...may be found to have a depraved mind..."

It will be noted from the opinion that no authority is cited for this proposition. Evidently it materialized in an effort to somehow substain death sentences in this State. Further, it is clear from the addendum and record that Petitioner's accomplice cut the victim's throat after death. Addendum, p. 2. Nor does Hance, supra, mention or in any way overrule Harris, supra, or Blake, supra, nor does it meet the Godfrey analysis relative thereto. Apparently, the Georgia Supreme Court has found a new "catch-all" to uphold death sentences.

(d) Petitioners inability to contest - in any fashion - by brief or argument, the addendum is in itself a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments.

III. THE COURTS RELIANCE UPON STANDEFER v. UNITED STATES, ___U.S. ___, 100 S.CT. 1999 (1980) IS INAPPOSITE.

The Georgia Supreme Court and Respondent both rely upon Standefer, supra, in urging affirmance of Petitioner's death sentence based upon Ga. Code Ann. 27-2534.1(b)(2). However, in Standefer, supra, the question before this Court was whether a defendant accused of aiding and abetting in the commission of a crime may be convicted after a named principal has been acquited of that offense. Standefer, 100 S. Ct. at 2001.

It is clear from the outset that Standefer, supra, involved trials of two different individuals for different crimes. In the case at bar, of course, we have a single defendant charged with capital murder in two counties.

If indeed "different juries may reach different results" then the doctrine of double jeopardy and its counterpart of collateral estoppel have no place in our system of justice. Does this mean a criminal defendant may be tried, acquitted, a new jury impaneled, and a conviction sustained? Obviously not. It is apparent that the State seeks to substitute its opinion of the adequacy of punishment for that of the jury which actually tried the case and resolved all the factual issues therein.

CONCLUSION

In light of the unique issues presented by this Petition; the significance of the decision below for future death cases both in Georgia and nationally, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BRUCE S. HARVEY, do hereby certify that I have furnished a copy of the within and foregoing Supplemental Brief in Support of Writ of Certiorari to the Supreme Court of Georgia, by mail, to:

Honorable Jeff C. Wayne
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in an envelope with sufficient postage thereon to carry same to its destination.

This 1st day of October, 1980.

Bruce S. Harvey
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